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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALBERT HESS,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is the Respondent, the Port Authority Trans-Hudson Corporation (PATH), a wholly-owned subsidiary of The Port Authority of New York and New Jersey, which is a direct agency of the States of New York and New Jersey, created by Interstate Compact, to which Congress consented, a State agency for Eleventh Amendment purposes under the criteria of *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979)?

2. Is the Port Authority and by extension, its wholly-owned subsidiary, the Respondent PATH, prevented from interposing the statutory conditions to suit, pursuant to which, this Court held in *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), the Legislatures of New York and New Jersey waived any Eleventh Amendment immunity, because a judgment against PATH would not be paid out of general state tax revenue?

LIST OF PARTIES

The Port Authority is a bi-State agency created in 1921 by a Congressionally-consented-to Compact to develop interstate public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 and 1921 N.Y. Laws, Ch. 154. The Compact is codified at N.Y. Unconsol. Laws §§6401-23 (McKinney's 1979); N.J.S.A. §§32:1-1 to-24 (West 1990). Pursuant to the Compact, and subsequently enacted bi-State legislation supplemental thereto, the Port Authority owns and operates thirty-seven public facilities in the Port District. The Port Authority has no subsidiaries other than the Respondent, the Port Authority Trans-Hudson Corporation (PATH), a wholly-owned subsidiary, which owns and operates the PATH railroad line between New York and New Jersey, and the Newark Legal and Communications Center Urban Renewal Corporation, which owns and operates an office building in Newark, New Jersey.

Petitioners Albert Hess and Charles F. Walsh are employees of PATH.

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POINT I

A Conflict Between the Second and Third Circuits Does Exist Regarding the Status of Respondent as a State Agency for Eleventh Amendment Purposes. Petitioners Have Improperly Formulated the Question Setting Forth the Parameters of the Conflict.

A. Petitioners' Question 1 Is Improperly Formulated.

PATH cannot reasonably deny that there is a clear conflict between the Second and Third Circuits on the status of the Port Authority and of its wholly-owned subsidiary, PATH, as a state agency for Eleventh Amendment purposes. For that is the precise conflict this Court let stand in *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), in basing its disposition on a finding that there had been a statutory waiver of PATH's Eleventh Amendment immunity, 495 U.S. at 304-05, rather than reaching the constitutional question of PATH's Eleventh Amendment status. The Second Circuit in that case below, *Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), inappropriately and unnecessarily in view of that Court's finding of waiver, reached the constitutional issue to hold that PATH was not a state agency for Eleventh Amendment purposes, 873 F.2d at 630-31.[1]

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[1] See in this regard, this Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-6 (1988):

> A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them . . . This principle required the courts below to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims. *If no additional relief would have been warranted, a constitutional decision would have been unnecessary and therefore inappropriate.* (Citations omitted) (Emphasis added)

At the same time, it also should be noted that Petitioners apparently are not now contesting the actual holdings of the district courts below, which were affirmed by the Third Circuit without comment, namely, that, under the reasoning of this Court's decision in *Feeney*, *supra*, PATH may interpose its one-year limitations provision, N.J.S.A. §32:1-163 (West 1990); N.Y. Unconsol. §7107 (McKinney's 1979), thus removing any statutory waiver, to defeat a claim brought pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §51 et seq. in federal court.

Furthermore, the courts of the Second Circuit obviously have not had an opportunity to pass on the specific question raised by the instant case, namely, the applicability of PATH's suability statute, in view of the Second Circuit's reaching of the constitutional issue in *Feeney*, *supra*.

Clearly then, it is not this case for which Petitioners are seeking review. Rather, it is the holding of the Third Circuit in *Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. and N.J.*, (*PBA*), 819 F.2d 413 (3d Cir. 1987), *cert. denied*, 484 U.S. 953 (1987). In *PBA*, the Third Circuit found that the Port Authority of New York and New Jersey was a state agency entitled to Eleventh Amendment immunity by evaluating the agency pursuant to all the factors laid down by this Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 444 U.S. 391 (1979), 819 F.2d at 417.

Thus, while PATH cannot reasonably deny the existence of a conflict between the two Circuits on the question of whether PATH is a state agency for Eleventh Amendment purposes, in commenting upon the instant petition, PATH takes issue with the formulation of the question Petitioners seek to have certified.

More specifically, Petitioners' Question 1 is improperly formulated in that it begs the very question to be decided

herein. Quite obviously, if it were conceded, as Petitioners would have it, that "no judgment against PATH will impact the state treasury of either of the two compacting states" and "the statutory structure of PATH indicates that it is not the arm of either of the compacting states", the result would be preordained. However, at the same time, PATH respectfully submits such a result, in effect, would create an absolute rule precluding the finding of Eleventh Amendment immunity for interstate agencies which, because of their interstate nature, generally tend to have financial and administrative structures separate from the creating states. Such an absolute rule would run afoul of this Court's decision in *Lake Country Estates*, *supra*.

Moreover, Petitioners' formulation is directly contrary to the consistent position of the Third Circuit on the status of the Port Authority and its wholly-owned subsidiary PATH, first enunciated in *PBA* and then reaffirmed in *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655, 663 (*en banc*) (3d Cir. 1989), *cert. denied*, 493 U.S. 850 (1989); *Leadbeater v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 45, 46 (3d Cir. 1989), *vacated on other grounds*, 495 U.S. 926 (1990); *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 813 (*en banc*) (3d Cir. 1991). As a result, Petitioners' formulation of Question 1 misstates the parameters of the conflict between the Circuits.

Accordingly, PATH urges that should the Petition be granted to resolve the conflict, that certification be granted on the questions as formulated above in PATH's Counter-statement of Questions Presented.

B. *The Third Circuit's Analysis Provides the Correct Rule of Decision.*

Although PATH cannot reasonably deny the existence of the conflict, PATH respectfully submits that the Third

Circuit's analysis in *PBA*, an evaluation of the Port Authority on the basis of *all* of the *Lake Country Estates* criteria, 819 F.2d at 417, provides the correct rule of decision. In contrast, Petitioners, echoing the analysis of the Second Circuit in *Feeney*, *supra*, 873 F.2d at 630, erroneously focus on the "state treasury" factor as outweighing all other indicia of state agency status. Indeed, their Petition serves only to demonstrate in any number of ways that the Port Authority and PATH do not draw upon general state tax revenue.

But, this Court has never held this factor to be the *sine qua non* for immunity. Indeed, in *Lake Country Estates*, *supra*, in acknowledging this factor as one of the elements to be considered, this Court made the simple observation that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." 440 U.S. at 400-01 (footnote omitted). Apart from the fact that requiring that a judgment "have the same practical consequences as a judgment against the State", actually indicates that a judgment *need not* be paid from general state tax revenue, nowhere in the *Lake Country Estates* opinion is there any indication that this factor is, by itself, controlling. Indeed, in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 n. 11 (1984), this Court held that suits against the sovereign are found not only where the judgment "would expend itself on the public treasury", but also where the public administration would be interfered with or a judgment would either compel or restrain the government in its actions, citing, *Dugan v. Rank*, 372 U.S. 609, 620 (1963). In point of fact, suits seeking injunctive relief against the state are as much barred by the Eleventh Amendment as are suits for money damages. See, *inter alia*, *Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

Furthermore, there is nothing in the authorities cited by Petitioners supporting the proposition that the notion of "state treasury" is referable only to general tax revenue, or even that there can be but one "state treasury".

Indeed, in *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459 (1945), cited by Petitioners, and the case most often cited for the importance of the "state treasury" factor, this Court's focus upon the potential liability of the state treasury was for the simple purpose of determining who, in fact, was the real party in interest since individuals were the nominal defendants, and a point apparently had been raised that the presence of such individuals as named defendants created federal court jurisdiction. This Court's words are clear and admit of no other interpretation:

> And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. (Citations omitted) 323 U.S. at 464.

Similarly, in *Edelman v. Jordan*, 415 U.S. 651 (1974), *reh'g denied*, 416 U.S. 1000 (1974), also cited by Petitioners for this proposition, again the focus on the "state treasury" was for the purpose of identifying the real party in interest where state officials were the only named defendants. Petitioners cite language in *Edelman* to the effect that:

> [T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. (Citations omitted) 415 U.S. at 663.

While that proposition is certainly true, it does not necessarily then follow that if a judgment is not paid from a state's general tax coffers, Eleventh Amendment immunity cannot be found under *Lake Country Estates, supra*. However, at no time does PATH concede that its treasury, dedicated to state governmental purposes, N.J.S.A. §32:1-35.59 (West 1990); N.Y. Unconsol. §6610 (McKinney's 1979), its uses legislatively constrained, N.J.S.A. §§32:1-4, 32:1-8 (West 1990); N.Y. Unconsol. §§6404, 6408 (McKinney's 1979)(App. G at 45a, 47a), and subject to gubernatorial veto, N.J.S.A. §32:1-35.57 (West 1990); N.Y. Unconsol. §6612 (McKinney's 1979) (App. G at 53a), is not a state treasury within the meaning of *Lake Country Estates, supra*.

Thus, PATH respectfully submits that the disposition of this matter by the Third Circuit below is the correct result.

POINT II

This Matter is An Inappropriate Vehicle to Revisit the Question of the Scope of Eleventh Amendment Immunity.

Petitioners ask this Court to take the opportunity to reexamine the scope of Eleventh Amendment immunity in cases arising under federal question jurisdiction. PATH respectfully submits that this case is an inappropriate vehicle for such reexamination. As PATH noted in POINT I, *supra*, the sole issue affirmed by the Third Circuit in the instant matter is whether under this Court's decision in *Feeney, supra*, PATH could interpose the one-year jurisdictional limitations provision, N.J.S.A. §32:1-163 (West 1990); N.Y. Unconsol. §7107 (McKinney's 1979), to defeat Petitioners' FELA claims in federal court, notwithstanding the FELA's three-year statute of limitations, 45 U.S.C. §56 (App G at 45a).

Accordingly, this case presents a rather unique situation where this Court has found waiver of Eleventh Amendment immunity to be expressly conditioned by the terms of a state statute, 495 U.S. at 307. Thus, the result herein does not necessarily impact any agency, bi-state or single state, other than the Port Authority and its wholly-owned subsidiary, PATH.

Moreover, Petitioners are the architects of their own fates. Petitioners cannot be heard to deny that they were informed of PATH's interpretation of this Court's *Feeney* decision in time to comply with PATH's one-year limitations provision. Certainly then, the circumstances at bar, an elapsed limitations provision, do not call into question the propriety of applying the Eleventh Amendment to defeat federal question jurisdiction.

CONCLUSION

The Petition For a Writ of Certiorari Should be Denied as to Question 2 of the Petition.

Dated: New York, New York
February 25, 1994

Respectfully submitted,

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